Editor's note: appealed - aff'd, Civ.No. 83-1216 (D.N.M. Dec. 6, 1984)

UNITED STATES
v.
C. J. ANDERSON
C. JOSEPH ANDERSON

IBLA 80-958 Decided August 28, 1981

Appeal from decision of Administrative Law Judge Michael L. Morehouse, declaring valid the Pine Grove placer mining claim. New Mexico 309.

Reversed.

1. Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Marketability

   A discovery of a valuable mineral deposit exists under the Federal mining laws where the minerals found are of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. Discovery requires a showing that the mineral can be presently extracted, removed, and marketed at a profit.

2. Administrative Procedure: Burden of proof -- Mining Claims: Determination of Validity -- Rules of Practice: Appeals: Burden of Proof

   In a Government contest of a mining claim for which an application for patent has been filed, the Government assumes the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to show by a preponderance of the evidence that the claim is valid.

3. Mining Claims: Contests

Government mineral examiners are not required to perform discovery work for claimants nor to explore beyond a claimant's discovery points. It is incumbent upon a mining claimant to keep his discovery points available for inspection by Government mineral examiners. Where he does not, he assumes the risk that the mineral examiner will not be able to verify the discovery of the alleged mineral deposit, and his unsupported argument that the samples taken by the examiner are not representative will be rejected.

4. Mining Claims: Discovery: Generally

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit, i.e., a valuable mineral deposit has not been found simply because the facts might warrant a search for such a deposit.

APPEARANCES: Demetrie L. Augustinos, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for appellant; J. C. Robinson, Esq., Silver City, New Mexico, for appellees.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal is taken from a decision dated August 21, 1980, by Administrative Law Judge Michael L. Morehouse, which declared valid the Pine Grove placer mining claim located in SW 1/4 SW 1/4 of sec. 24, T. 16 S., R. 14 W., New Mexico principal meridian, Grant County, New Mexico.

On February 14, 1977, contestees (appellees herein) filed a mineral application for patent NM 29885. On June 27, 1979, the New Mexico State Office, Bureau of Land Management (BLM), on behalf of the U.S. Forest Service, instituted contest NM 309 by filing a complaint which charged that there were not presently disclosed within the boundaries of the claim minerals of a variety subject to the mining laws, sufficient in quantity, quality and value to constitute a discovery.

An evidentiary hearing was held before Judge Morehouse on January 9, 1980, in Silver City, New Mexico.

In his decision, the Judge found that contestant (appellant herein) had presented a prima facie case of lack of discovery of a valuable mineral. He also found that the evidence of discovery presented by appellees preponderated over the Government's prima facie case and accordingly held that patent should issue.

Appellant contends essentially that the evidence is insufficient to show discovery, that the Judge improperly weighed the evidence, and that he abused his discretion in advocating the cause for appellees.

We turn first to the last contention. Responding to the objection of appellant's counsel at the hearing, the Judge stated:

> JUDGE MOREHOUSE: All right, your objection is certainly noted, Mr. Augustinos, and I might add that because Mr. Anderson is not represented by counsel and is not versed in the formal ways of presenting evidence, it appeared to me that he had a lot of information that was pertinent to his case that he was unable through his own efforts to get into the record and I felt that it was my responsibility as an Administrative Law Judge to see that he got his -- what information he had into the record. All right.

(Tr. 143).

This statement is an accurate reflection of the Judge's conduct at the hearing. We find that the hearing was conducted within the parameters and discretion accorded Administrative Law Judges under 43 CFR 4.433, 4.435(a), 4.452-4, and 4.452-6(a). We conclude that appellant was in no way prejudiced at the hearing.

Since, however, we find the Judge's decision to be in error, we now proceed with a summary of the evidence and the applicable law.

The appellant's evidence was presented by a Forest Service Mining Engineer, Donald Alexander, who first visited the claim on October 27 and 28, 1977. On those visits he took five samples from areas designated by one of the appellees (Tr. 17, 18, 20). The engineer panned down these samples but did not have them assayed because he judged them to be of insufficient quality to support a patent application (Tr. 21). On May 4, 1978, the engineer returned to the claim and took seven samples from areas designated by appellees (Tr. 22, 24). He testified that bedrock was not generally exposed or visible, but that one of his samples was taken from what might have been bedrock (Tr. 30, 156, 157). The samples were concentrated, bottled, labelled and sent to the Skyline Assay Laboratories in Tucson, Arizona, for assay (Tr. 31, 32). The assay report (Exh. G-5) shows gold concentrations ranging from 0.235 mg to 10.670 mg for the seven samples taken on May 4. The engineer visited the claim again on September 25, 1979. On that occasion he observed that there had been slightly more activity on some of the workings. No

official sampling, however, was undertaken (Tr. 33-34). In Exh. G-7, the engineer computed, based on the data yielded by his sampling and the assay, the amount of minable gravel, the estimated amounts of gold and silver recoverable, and the monetary return from the minable material. 1/ At Tr. 37-66, the engineer explained his sampling and his calculations in some detail. Based on his findings, he ventured the opinion "that gold would have to be about $2,800 an ounce to make a minimum wage in this particular claim * * *" (Tr. 50). He testified that there might be 9000 cubic yards of pay gravel, but that many more samples, perhaps a couple of hundred, would be necessary to arrive at a conclusion as to the economic significance of the claim (Tr. 159-160). According to the engineer, a prudent man would not be justified in expending labor or means in the hopes of developing a paying mine (Tr. 50).

Appellee C. Joseph Anderson testified that since appellees had acquired the claim in 1977, 480 cubic yards of gravel had been concentrated and 15 troy ounces of gold recovered (Tr. 74, 107, 110). None of this gold was assayed, some was given away, less than an ounce ($48 worth) was sold, and some was lost (Tr. 76, 107). According to appellees' estimates the claim contains at least 50,000 cubic yard of unplacered gravel, 16,000 yards of which would be pay gravel (Tr. 90, 99). The pay gravel would yield 43.63 grains of gold (0.09 ounce) per cubic yard (Tr. 77, 100, 125). Appellees' estimate of recoverable gold is based on the theory that each of the 16,000 yards will yield 43.63 grains of gold. C. Joseph Anderson conceded that his calculations were based on inference and that more concise information on the amount of recoverable gold would have to await further prospecting and exploration (Tr. 113, 125, 136). He felt that the claim could provide subsistence for a man working with pick and shovel, although minimum wage could not be made (Tr. 115), and that a backhoe would be necessary for a profitable operation (Tr. 136). He testified that "assuming the gold is there" and $ 600 an ounce, and considering the factors bearing on extraction, $1308.72 worth of gold per day could be mined using a backhoe and machines (Tr. 136-141).

C. Joseph Anderson testified repeatedly that the engineer was unwilling to dig down to bedrock, although assured by appellees that was where the gold could be found (Tr. 94-97, 130, 132-33).

1/ Based on a gold value of $600 per ounce, the engineer calculated the following monetary values (for gold) per cubic yard:

Sample A 1	$14.5324
Sample A 2	15.4083
Sample A 3	1.2199
Sample A 4	8.4880
Sample A 5	9.5290
Sample A 6	2.5206
Sample A 7	0.4650

He calculated a value per cubic yard, of gold and silver of $5.73 (see Exhibit G-7).

He also testified that appellees would have been glad to dig down to bedrock, but didn't know how deep it was (Tr. 96). He felt that the engineer should have known that gold was on bedrock and that his samples should have been taken on bedrock to have a proper bearing on the deposit (Tr. 129).

[1] As this Board has often ruled, a discovery exists only where minerals have been found in quantities such that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. United States v. John McDowell, 53 IBLA 270 (1981); United States v. Richard H. Kingdon, 36 IBLA 11 (1978). This rule, known as the "prudent man test" was first enunciated in Castle v. Womble, 19 L.D. 455, 457 (1894), approved by the Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905), and followed consistently thereafter. Accord, United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). The prudent man test has been complemented by the "marketability test" requiring that a claimant show that the mineral can be extracted, removed, and marketed at a profit. United States v. Coleman, supra; Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[2] It is well settled in a contest against a mining claim for which a patent application has been filed that the Government must make a prima facie case in support of its charges and that the burden then shifts to the claimant to show by a preponderance of the evidence that the claims are valid, even apart from the issues raised in the contest. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Cornelius E. Mannix, 50 IBLA 110 (1980). The Government has established a prima facie case of a lack of discovery when an expert witness testifies that he has examined the claim and has found the mineral value insufficient to support a finding of discovery. United States v. Tempest Mining Co., 40 IBLA 297 (1979). In the case before us, the opinion of the Government mining engineer, that appellees would not be justified in expending labor and means in the hope of developing a valuable mine established appellant's prima facie case.

[3] It is the duty of the mining claimant whose claim is being contested to keep discovery points available for inspection by Government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim, nor do they have to go beyond examining the discovery points of the claimant. The function of Government's mineral examiners is to examine the discovery points made available by the claimant and to verify, if possible, the claimed discovery. United States v. Brunskill, 51 IBLA 199 (1980); United States v. Bryce, 13 IBLA 340 (1973).

[4] Mineralization which may warrant further exploration or prospecting in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit. That is, a valuable mineral deposit has not

been found because a search for such a deposit might be indicated. Converse v. Udall, supra; Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970).

In the appeal before us, the Judge's conclusion that appellees' evidence of discovery preponderated over the Government's prima facie case is supported as follows:

> [Appellees] have moved 480 cubic yards of gravel a good deal of which came at or near bedrock. Accurate logs of this activity were kept which were read into the record and from the material mined approximately 15 ounces of gold were extracted. This gold was not assayed as such, however, as noted in the record, a vial containing over 3 ounces of flake gold was produced at the hearing. This gold came from the placer material on the claim. This was not questioned by the government.
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> The mining laws do not require that the values shown must be such as will demonstrate that a claim can be worked at a profit or that it is more probable than not that a profitable mining operation can be brought about. United States v. C. F. Smith, 66 I.D. 169, 172 (1959). Nevertheless, it has been held that the nucleus of value which sustains the discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result. United States v. Santiam Copper Mines, Inc., A-28272 (June 27, 1960); United States v. Coleman, supra. This the contestees have done. With a backhoe and a proper grid and trommel, contestees have shown that a profitable venture may reasonably be expected to result. The government had no real rebuttal evidence to the contrary.

(Decision at 4).

We have carefully reviewed the record but have found no document representing an "accurate log" of appellees' gravel processing. C. Joseph Anderson simply testified with reference to a claim sketch (Exh. G-3), on which, during the course of direct examination, he marked the dimensions of the diggings appellees had undertaken over the years. This testimony, which is found at Tr. 77-86, does not reveal the source of appellees' figures, nor does it show what kind of records, if any, they kept of the periodic processing of the gravel. The gold brought to the hearing was a fraction of the 15 ounces extracted by appellees since they have held the claim.

Similarly unsupported by the evidence is the conclusion that a profitable venture may reasonably be expected. Appellees have worked the claim only sporadically (Tr. 106), and over the years development has been minimal. Although they were contacted by persons interested in underwriting the venture, appellees did not, for reasons of their own, cultivate these contacts (Tr. 114, 115).

C. Joseph Anderson's testimony with respect to equipment and machines to work the claim is in the realm of possibilities and contingencies. It does not demonstrate discovery. Appellees' figures as to pay gravel and potential gold recovery are based on conjecture and unsupported by documentary evidence of any kind. They have never bothered to have assays made and their claims of mineralization at bedrock are of no probative value absent proof of such deposits. United States v. Lambeth, 37 IBLA 107 (1978).

Appellees' sale of $48 worth of gold in all the years they have held the claim suggests that the values discovered will not support a profitable mining venture, and raises a presumption of lack of discovery. United States v. Zweifel, 508 F.2d 1150, 1156 (10th Cir. 1975). Appellees' evidence taken as a whole, falls far short of preponderating over the Government's prima facie case. The engineer's calculations and conclusions (Exh. G-7) have gone unchallenged. In fact, the only significant challenge appellees presented to the Government's case is their emphatic charge that the engineer improperly failed to dig to bedrock where evidence of the deposit could have been found. The well-settled rule that mining engineers have no duty to explore or prospect a claim has been discussed above.

As a result of our de novo review of the record we conclude that no discovery of a valuable mineral is presently disclosed on the Pine Grove placer mining claim such as will support a patent application under the mining law. Accordingly, the claim is declared null and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Gail M. Frazier
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge